PART TWO: TECHNICAL AND REGULATORY BARRIERS

"The technical and regulatory issues associated with promoting multi-channel video programming competition in New Jersey by local exchange telecommunications companies and interexchange telecommunications carriers"

PART TWO: TECHNICAL AND REGULATORY BARRIERS

There are virtually no regulatory barriers to telephone company entry in the multi-channel video market. The 1996 Act repealed restrictions on cross ownership and allowed traditional ILECs to provide video service. In the case of an OVS operator, as discussed below, the situation was a bit more complex because state requirements may apply.

While the regulatory restrictions associated with local exchange companies ("LECs") and interexchange companies ("IXCs") providing multi-channel video services are few, the technical side remains the primary impediment because of the limited bandwidth of existing telephone infrastructure. The technology exists to expand the bandwidth of legacy infrastructure, but the costs are prohibitive and therefore the business case for LEC provisioning of multi-channel video is poor. (The business case for IXCs providing video services is even worse considering they do not own a local distribution network.) The situation may be slowly changing, however, with the recent announcement that Verizon may soon deploy optical fiber technology to homes in states and jurisdictions where the regulatory environment is hospitable.31 As discussed in more detail below, FTTH and other fiber-based services offer more capacity than any cable or satellite system now operating, allowing for the delivery of voice, high-speed Internet access and video services. Because of the substantial costs of such deployments, we are extremely reluctant to predict, in any short- and medium-term time frame, that Verizon will become a serious competitor in the multi-channel video industry via FTTH. Nevertheless, Verizon's recent announcement that it will begin offering DirectTV this year bundled with local, long distance, Internet and wireless services may increase DBS subscribership

Regulatory Barriers

The 1996 Act repealed the FCC's limitations on telephone-cable cross-ownership, thus laying the foundation by which telecom companies could provide multi-channel video services in competition with cable providers. Moreover, consistent with the Congressional goals of promoting "flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology and increased consumer choice,"32 the Act provided for the creation of a new type of video platform known as OVS. OVS is a facility consisting of a set of transmission paths and associated signal reception and control equipment that is designed to provide cable service to multiple subscribers within a community.

OVS was established in the 1996 Act as a new framework for entry into the video-programming marketplace. As an enticement for LECs to enter into competition with cable operators, the provisions of the 1996 Act are designed to free OVS operators from many regulatory burdens imposed by prior law. Although OVS operators are subject to the same provisions as franchised cable television operators with regard to PEG access requirements, must-carry rules, ownership restrictions, and certain other regulations (see Part I supra), they may be free from all franchising obligations and regulations, rate regulations, consumer electronics equipment compatibility regulations, and consumer protection and customer service rules. Plus, if a LEC decides to go the traditional route and request franchise approvals, the BPU will expedite the process in order to insure that LECs can begin to provide competition with cable companies immediately.

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[31] Statement of Bruce Cohen, Esq., Vice President and General Counsel, Verizon-New Jersey, Public Hearing, In the Matter of the Status of Broadband Telecommunications and Multi-Channel Video Programming Competition in New Jersey, February 26, 2004

[32] Implementation of Section 302 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, CS Docket No. 96-46, FCC 96-99, ¶ 4.

While similar to a common carrier, the FCC chose not to regulate OVS as such in order to encourage common carriers to seek OVS certification and enter competition into the entertainment and information market. In return, an OVS operator must open its "platform" to other programmers. The OVS operator must offer two-thirds of the system's total channel capacity to other video providers on a leased basis to enjoy the benefits of decreased regulation (in instances where demand for channel carriage exceeds system channel capacity of the OVS operator). Moreover, affiliated programming concerns can occupy no more than 1/3 of available capacity on the network. In contrast, traditional cable operators operate under no such restriction. Aside from the programming restriction and lesser federal regulatory burdens, there are little if any physical differences between OVS and a cable system.

There are 24 certified OVS providers in the country. RCN Telecom, a CLEC has received certification from the FCC to provide video services in its telephone service areas. It is currently operating in New York, Boston, and Washington D.C. In New Jersey, RCN Telecom obtained certification from the FCC in 83 municipalities and local authorization in thirteen municipalities (Jersey City, Hoboken, Bayonne, Edgewater, Fairview, Cliffside Park, Fort Lee, Weehawken and Guttenberg, Nutley, North Bergen, North Arlington and Lyndhurst). RCN estimated it would begin offering OVS at the end of 2000 but ceased all operations in the State by the end of 2003 after selling its cable systems to Patriot Media and abandoning its plant and plans to become an OVS operator in New Jersey. Analysts suggest that a flawed business model rather than State or federal regulatory issues contributed to the company's financial woes and it now finds itself on the brink of Chapter 11 bankruptcy protection. The only RCN property remaining in New Jersey is a SMATV System in the Newport Center complex in Jersey City.

Technical Impediments

While the regulatory impediments to multi-channel video provisioning by LECs have decreased substantially with the passage of the 1996 Act, the technical barriers have not. The PSTN still mostly consists of 100 year-old copper wires designed to allow two individuals to converse with one another, not for television transmission. In order for the PSTN to act as a cable platform, advanced broadband technologies must be deployed ubiquitously. Increasingly, new broadband technologies such as DSL allow users to access the Internet at speeds that are multiples of what the traditional dial-up modem would allow. Nevertheless, only 20% of U.S. households have broadband service, while the ratio is likely to increase to 44% during the next four years, according to the Yankee Group.

While broadband is a necessary antecedent to telephone-based video services, it alone is not sufficient to provide multi-channel video services. The reason lies in those 100 year-old copper wires that are optimized to carry only voice and have a bandwidth restricted to only 4 kHz. The worldwide PSTN can only transmit signals with this bandwidth suitable for speech. This limits the bit rate available over a telephone connection to a maximum of 56 kbps on a standard analog telephone, far below the 15 to 20 megabits per second ("Mbps") needed to provide multi-channel video services. DSL is a technology created to allow a customer to receive broadband connections of between 500 kbps and 6 Mbps to the Internet or to other data networks over copper telephone lines that connect to their home and business in what is referred to as "the last mile." DSL technology expands the frequency available over traditional copper telephone wires well beyond the 4 kHz used for voice, thus also increasing the data bit rate that can be transmitted over a telephone line. However, another DSL technology known as VDSL is seen by many as the next step in providing a complete home-communications/entertainment package. VDSL provides transmission speeds of up to 52 Mbps, sufficient to provide multi-channel video services. But VDSL's

performance comes at a price: It can only operate over the copper line for a short distance, about 4,000 feet.

The key impediment to widespread deployment of VDSL is the need for telephone companies to replace their main copper feeds with fiber-optic cable. Fiber optic systems use light impulses to transmit data over a glasslike filament, as opposed to transmitting electrical charges on copper wire or hybrid fiber coaxial cabling. The dilemma for LECs is that the wide deployment of VDSL can cannibalize existing and highly profitable high bandwidth business private line services. Moreover, because of the high retail cost of broadband service, the number of people willing to pay for broadband service and the revenue returned are currently insufficient for the LECs to make the business decision about extending and deploying broadband into new areas. Until broadband is widely deployed, moreover, the services, such as video, that create customer demand to use these high bandwidth services may not be available at a cost consumers are open to paying. The result is a cycle, where the carrier's failure to justify the spending of capital results in a lack of broadband applications and content, which keeps demand for the services relatively low.

The only example of a New Jersey company using VDSL is Hometown Online, a cable television subsidiary of WVT. The company received certification by the Board in 2002 to provide cable TV service in Vernon (Cablevision) and West Milford (Service Electric) townships, each of which was already served by franchised operators. The parent company has provided telephone service since 1903. This system utilizes VDSL technology over its telephone plant to offer a bundled package of video, Internet and telephone services. As of January 1, 2004, Hometown Online had 777 customers, and, as previously discussed, due to its size and federal regulation, is free of price controls.

While VDSL requires fiber deployment into the neighborhood, FTTH requires fiber directly to the customer's residence or business, and is seen by many as the ultimate solution for broadband access. Most of the telecommunications and cable networks within the United States, excluding the local loop from the central office to the end user's premise, already contain significant optical fiber. The task at hand nationally is to lay the same optical fiber in the last mile extending from a telephone central office or cable headend into the home or business. While there have been small-scale trials, FTTH is considered a longer-term strategy for broadband because of the expense of replacing the legacy copper wires.

PART THREE: HIGH SPEED INTERNET

The technical and regulatory issues associated with classifying every high-speed Internet service as a "telecommunications service," as defined in section 2 of P.L.1991, c.428 (C.48:2-21.17).

PART THREE: INTERNET AS TELECOMMUNICATIONS SERVICE

Cable modem, DSL and VOIP – all formats of high-speed Internet service – are undergoing vast regulatory changes. As a result, it would be risky to undertake any State regulation of these services at this time. The technical and regulatory issues are discussed immediately below, with a discussion of relevant cases under "FCC Rulings" and "Recent Court Challenges."

Impact In New Jersey

As demonstrated below, the technical and regulatory issues associated with classifying every high speed Internet service as a "telecommunications service," as defined within current New Jersey statutes, relies heavily on the ultimate classification of these services by the federal government. These rulings will ultimately determine the ability of the states to exercise jurisdiction, and the extent to which they will be permitted to regulate the service.

Although federal law provides for a greater regulatory role by the states for telecommunications services, a general reclassification of all high speed Internet services as telecommunications services does not necessarily equate to providing the state with the ability to regulate these broadband services in the same manner as traditional telecommunications services are regulated. Currently, New Jersey statutes do not provide for blanket regulation over each and every "telecommunications service" as defined by N.J.S.A. 48:2-21.17. In 1992, the Legislature revised the New Jersey statutes to limit traditional utility regulation to only certain "protected telephone services" which were not determined by the Board to be a competitive service. Concurrently, traditional long distance telecommunications services provided by interexchange carriers were deemed competitive services, and thus freed from traditional utility regulation.

Rate Regulation In New Jersey

Traditional rate regulation for certain local telecommunications services was modified by the Legislature in 1992 when the Board was empowered to approve plans for alternative forms of regulation submitted by local exchange carriers. Since 1992, Verizon –New Jersey's rates have been regulated pursuant to a Plan for Alternate Regulation ("PAR"), while the majority of their services have been deemed competitive by the Board. Similar to the Legislature's findings in 1992 that "[p]ermitting the competitive interexchange [long distance] telecommunications marketplace to operate without traditional utility regulation will produce a wider selection of services at competitive market based prices," it is highly likely that the same would apply to high speed internet services, and they would be deemed competitive services under N.J.S.A. 48:2-21.17.

Internet Services

Currently, most users who access the Internet utilize dial-up modems that offer speeds of less than 56 kilobits per second. Increasingly, new broadband technologies such as cable modem and DSL allow users to access the Internet at speeds that are multiples of what the traditional dial-up modem would allow. This is what traditionally constitutes the definition of "high speed Internet access." The FCC has defined "high speed" Internet access, in general, as a service that "enables consumers to communicate over the Internet at speeds that are many times faster than the speeds offered through dial-up telephone connections" and that enables subscribers to "send and view content with little or no transmission delay, utilize sophisticated 'real-time' applications, and take advantage of other high-bandwidth services."[33]

[33] *Proposed Rules, Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 67 FR 9232-01, 2002 WL 274748 (F.R.), CC Docket No. 02-33, CC Docket No. 95-20, CC Docket No. 98-10;

Factors Affecting Cable Modem Competition

Cable modem service provides an attractive option for customers seeking alternatives to obtain high speed Internet access, as well as an additional source of cash flow for cable companies. Since cable modem service does not rely on the local telephone network, it does not face the technical constraints of provisioning as seen with DSL service (see Part II), and in some geographic areas, cable modem service provides the only vehicle for customers seeking broadband service. Cable companies also tout the fact that the cable modem service provides a continuous connection and is "always on," therefore not requiring you to dial in each time a customer wants to access the Internet.

Regulatory Status of Cable Modem

The regulatory status of cable modem service initially presented cable providers with lucrative opportunities. In March 2002, the FCC issued a declaratory ruling classifying cable modem service as an "interstate information service." This classification effectively preempts rate regulation by local franchising authorities, and, in addition, relieves the cable operator from being assessed franchise fees on the gross revenues that the cable operator receives for the service. Concurrent with its ruling, the FCC initiated a rulemaking proceeding to determine the scope of the FCC's jurisdiction to regulate cable modem service and whether cable modem service should be regulated under the law, in light of existing principles regarding regulation of the Internet and broadband services. A recent court ruling, *Brand X,* vacating the FCC's classification of cable modem service as an interstate information service, has left this issue unresolved, and with the FCC focused on appealing the decision, all related rulemakings are on hold at this time.

Cable Modem Rates

The classification of cable modem service as an interstate information service by the FCC precludes local franchising authorities such as the BPU from regulation of the rates. Thus, rates for cable modem service are currently free from regulation from both state and federal authorities.

Similar to the business plans of the telephony providers, cable providers typically offer bundled packages of cable television and cable modem services to its customers, with a reduced rate for the cable modem service for those that receive the package, as opposed to stand-alone cable modem service. Comcast High Speed Internet Service is $57.95 per month for non-cable customers, while Comcast cable customers are charged $19.99-29.99/ month for the first three months, and $42.95 thereafter.[34] Customers that do not own a modem may purchase one for $139.00 or lease one from Comcast for $3.00/month. Cablevision offers it Optimum Online High Speed Internet Access service at $49.95 to non-Cablevision cable customers, and to cable customers at $44.95. Cablevision provides the modem free to customers for as long as they use the service, or customers can purchase one from Cablevision for $65.00.[35]

Cable Modem Customer Service

The subscriber must have a computer system and a working cable modem connected via an Ethernet or USB interface to establish cable modem services. As a result, the cable modem service provider may offer various installation service for a fee, which could include: the installation of

FCC 02-42, February 28, 2002, n.2.

[34] www.comcast.net

[35] www.optimumonline.com

Ethernet device, modem and/or loading of service software in the subscriber's computer; any outside/inside wiring of the subscriber's premises that may be necessary; simple and complex customer service, and technical support. The cable modem service provider provides the billing, provision, and management of its accounts for its subscribers, as well as the sales and marketing of the service to solicit and obtain new customers.

Consumer Protection Issues

There are presently no specific customer service provisions on the State or federal level regarding cable modem service providers. Customers can still avail themselves of the services of the state Consumer Protection agencies for instances where contractual disputes arise or fraudulent activities are alleged.

DSL

DSL offers access to high-speed data networks or the Internet over a single pair of copper wires that connect to the home or business, but it is distance sensitive. Nevertheless, DSL is the most common alternative to cable modems. DSL claims more than 200,000 subscribers in New Jersey as reported by DeHavilland Information Services, compared to the 700,000 cable-modem users in New Jersey.[36]

There are over 30 providers of DSL service in New Jersey including Earthlink, Galaxy DSL, Juno Express, Telocity, Net Access and FASTNET, to name a few. Although these services are not in direct head-to-head competition with cable or DBS, the phone companies' ability to provide these services may ultimately affect its ability to compete with cable and DBS in multi-channel video programming or other areas over the long run.

Factors Affecting DSL Competition

Some would argue that high speed Internet offerings by cable companies were the impetus for the ILEC's aggressive deployment of DSL in recent years. Cable modem subscribers have far outnumbered DSL providers in the last three years, with DSL making slow and steady increases to attempt to catch up to cable. The technical limitations of DSL deployment place limits on the service areas where DSL is available. One of the primary problems, known as the "distance limitation," limits DSL to only those locations within a three mile maximum loop from the ILEC's central office. This allows cable modem service to stand as the only broadband service available in certain areas.

In addition, the FCC's rulings requiring DSL be made available to competitors under the unbundling requirements of the 1996 Act have spawned numerous CLEC DSL providers. The ability of CLECs to require ILECs to unbundled necessary equipment may be curtailed by ongoing FCC proceedings, such as the Triennial UNE Review, and the fact that several FCC rulings on this issue have been vacated and remanded to the FCC following decisions on appeals.

DSL Rates

DSL is classified as an interstate telecommunications service by the FCC, and, therefore,

[36] VDSL, with speeds that surpass both DSL and Cable Modem, can overcome distance limitations through a fiber optic gateway and requires one line connection that can support phone as well as data traffic. Currently, Warwick Valley Telephone offers VDSL to 777 customers in New Jersey. Other homes and business in New Jersey are connected to the Internet by satellite or wireless providers.

rates for DSL service are not regulated by the Board. The pricing for most ILEC DSL offerings are similar to those offered by the cable providers for their high speed Internet service. Verizon's residential DSL service is available at $34.95/month, with customers choosing a bundled packaged of Verizon local and long distance service receiving the DSL service at a discounted rate of $29.95/month.

DSL Customer Service

Although the Board may monitor DSL complaints, currently there are no requirements on the state level for the Board to address DSL customer service issues. The BPU, however, does attempt to informally resolve concerns between consumers and DSL providers, when appropriate.

Voice over Internet Protocol

VoIP, introduced over eight years ago, is a category of hardware and software that enables people to use the Internet as the transmission medium for telephone calls. For users who have free, or fixed-price Internet access, Internet telephony software essentially provides free telephone calls anywhere in the world. To date, however, Internet telephony does not offer the same quality of telephone service as direct telephone connections.

How VoIP Works

VoIP is the sending of voice information in digital packets rather than the traditional circuit-committed protocols of the PSTN. A major advantage of utilizing this protocol is the avoidance of access charges required when using the PSTN, as well as regulatory filings.

Factors Affecting VoIP Competition

Currently, there exists no uniform model for the regulation of VoIP. On February 12, 2004, the FCC issued a Notice of Proposed Rulemaking to address the issue of regulation, public safety, E911, law enforcement access, consumer protections and disability access. In connection with this proceeding, the FCC initiated a Communications Assistance for Law Enforcement rulemaking proceeding to address the technical issues associated with law-enforcement access to Internet-enabled services.

The following are examples of the positions of other parties to this issue:

- FCC Chairman Michael K. Powell has stated "No regulator, either federal or state, should tread into this area without an absolutely compelling justification for doing so."
- California Public Utility (CPU) Commissioner Carl Wood argued that regulators have an obligation to oversee telephone services, whether they travel over traditional lines or the Internet. Further, "The advent of Internet phone calls does not in and of itself exempt it from telecommunications regulation."
- However, CPU Commissioner Susan Kennedy, named by the FCC to its national commission on advanced telecommunications services, is in the forefront of the CPU's new "wait and see" stance on VoIP. According to press reports, Kennedy has said the CPU will wait until the FCC makes up its mind on whether or not to regulate VoIP.
- The US District Court in Minnesota imposed a permanent injunction against the Minnesota

Public Utilities Commission from requiring Vonage, a New Jersey based corporation, to obtain state certification as a telephone company.

- The National Association of Regulatory Utility Commissioners issued a resolution that resolved that phone-to-phone calls over IP networks are telecommunications services and should be regulated as such.

- Florida has taken a "hands-off" approach to VoIP. New legislation mandates that VoIP be free of "unnecessary regulation... regardless of the provider."

- The New York PSC in 2002 issued a decision in a complaint proceeding between two carriers, finding that a provider of intrastate long distance services using IP telephony is subject to access charges because it is providing a telecommunications service, not an information service. The PSC noted that this issue was part of a specific complaint and did not constitute a general policy ruling.

- In response to a filing by Qwest, the Colorado District Court for the City and County of Denver concluded in 2001 that VoIP providers should be subject to switched access charges. Despite this ruling, the PUC repeatedly found that IP telephony services should not be included in the definition of switched access service and should not be subject to access charges.

- The Commissions from South Carolina, Nebraska, Ohio, Washington, Pennsylvania and Alabama have initiated generic proceedings to consider the regulation of VoIP.

- In arbitration proceedings, North Carolina, Alabama and Kentucky have declined to determine whether IP telephony should be included in the definition of switched access traffic until the service was defined with some certainty or the FCC made some definitive statement.

VoIP Public Safety Issues

A leading concern of the explosion of callers using IP telephony is the compatibility of these systems with the emergency 911 system currently in place. As of now, callers to 911 cannot be located as quickly, or at all, using IP technology.

A major public policy concern regarding the proliferation of calls using IP technology is the reduction of revenue available for the Universal Service Fund, a $6 billion annual program, which is paid through fees on most telephone bills.

The issue of access charges will be a major focus of the incumbents' argument for regulation of VoIP that uses the PSTN for delivery of the call. There is a distinction between "pure VoIP" which does not touch the PSTN and "POTS VoIP" where IXC's utilize the Internet for transport only and the PSTN for delivery of the call.

FCC Rulings

Although both cable modems and DSL provide the same final byproduct – high speed internet service – there is a general regulatory dichotomy between these two services that rests squarely within the federal regulations which distinguish between telecommunications service, cable service, and information service.

Telecommunications services fall under Title II of the Communications Act of 1934 and carry various interconnection, resale and unbundling obligations under the 1996 Act and existing FCC regulations. To varying degrees, they come under the jurisdiction of both the FCC and the states. Similarly, local franchising authorities have limited jurisdiction over cable services under Title VI of the Communications Act, but not over information or telecom services. Information services fall under Title I of the Telecom Act, and provide little, if any, authority to states or local jurisdictions for regulation.

Recently, the FCC has attempted to revisit issues arising from the varied regulatory and statutory classifications of services, as part of a broader goal of comprehensively rationalizing the disparate regulatory regimes in light of the agency's overarching policy objectives and the emerging converged environment for communications services. In rulings and rule-making proceedings launched during the last two years, the FCC has made attempts to clarify the classification and regulatory treatment of telephone (wireline) and cable broadband access services, several court decisions, however, have left certain areas unclear.

Telephone broadband services

As early as the FCC's Computer Inquiries initiated in 1966, ILECs that provide basic service are required to unbundle their underlying transmission facilities for the provision of enhanced services on a nondiscriminatory basis, while non-ILEC "enhanced" services providers ("ESPs") are, for the most part, unregulated, and therefore not subject to these unbundling obligations, rate regulation, universal service contributions, or the payment of access charges. Examples of enhanced services include Internet access, web hosting, e-mail, instant messaging, and, more arguably, Internet telephony.

The federal 1996 Act essentially codified the basic/enhanced regulatory classification scheme promulgated in the Computer Inquiries, but replaced the basic/enhanced services distinction with the terms "telecommunications services" and "information services." Consequently, services considered "basic" under the Computer Inquiries are now classified as telecommunications services, and services considered "enhanced" under the Computer Inquiries are now information services under the Act's definitions. The 1996 Act also required much more extensive cost based unbundling of ILEC network elements needed to provide a telecommunications service than was required under the limited requirements for unbundling of the underlying transmission element of an enhanced service at nondiscriminatory rates. The Computer Inquiries are still operative, however, and provide ESPs with the ability to gain access to the ILEC's network, since ESPs are unable to use the unbundling rules of the 1996 Act because those are limited to telecommunications providers.

The definitions of these two terms also have implications for the unbundling and resale provisions in the 1996 Act. The 1996 Act requires ILECs to provide unbundled network elements ("UNEs") at cost-based rates "to any requesting telecommunications carrier for the provision of a *telecommunications service*" (emphasis added). The Act also requires ILECs to "offer for resale at wholesale rates any *telecommunications service* that the carrier provides at retail to subscribers who are not telecommunications carriers" (emphasis added). In light of this statutory language, information services provided by ILECs are excluded from the scope of the 1996 Act's unbundling and resale obligations because they are not telecommunications services. Therefore, if an ILEC service is classified as an information service rather than as a telecommunications service, competitors may be precluded from gaining access to the network elements that comprise the service via the 1996 Act's unbundling and resale rules. Instead, the more limited Computer Inquiries, which are more costly to utilize, would have to be relied upon in order to gain access to the

underlying transmission component of the ILEC's information service.

DSL

In 2000, the FCC ruled that a DSL service tariffed by GTE was an advanced telecommunications service subject to common carrier obligations.[37] In February 2002, the FCC tentatively concluded in its Wireline Broadband NPRM[38] that Internet access over telephone wires using broadband technologies such as DSL is an information service with a telecommunications component. As noted in the NPRM:

> We tentatively conclude that wireline broadband Internet access services – whether provided over a third party's facilities or self-provisioned facilities – are information services subject to regulation under Title I of the Act . . . . Specifically, we tentatively conclude that when an entity provides wireline broadband Internet access service over its own transmission facilities, this service, too, is an information service under the Act. In addition, we tentatively conclude that the *transmission component* of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications," but not a "telecommunications service."[39]

However, the issue of how the transmission telecommunications component should be treated from a regulatory perspective, i.e. the extent to which ILECs are required to provide resale and unbundled access to the DSL component of a wireline broadband offering, remains a frequent matter of contention among the ILEC and CLEC industries today. In addition, the FCC's recent decision in its Triennial UNE Review Order ("TRO") also has a direct impact on this issue, since it provided ILECs with relief from unbundling requirements in certain instances for certain markets and certain services. This decision is in limbo, however, with the recent decision on appeal of the TRO issued March 2, 2004, which vacated the majority of the FCC's findings in this regard.

Cable broadband services

The FCC ruled in March 2002, following its Notice of Inquiry, that cable modem service was an information service and therefore not subject to any of the requirements of a telecommunications service under Title II (unbundling, resale, universal service, access charges), or a cable service under Title VI (franchise fees, customer service standards).

Recent court rulings have thrown into the question the FCC's classification of cable modem service as an interstate, information service. In October 2003, in *Brand X Internet Services v. FCC*,[40] a three-judge panel of the Ninth Circuit Court of Appeals ruled that a cable modem service is a combination of telecommunications service and information service, and vacated and remanded back to the FCC its declaratory ruling classifying cable modem service as an interstate, information service. The Ninth Circuit's decision reaffirmed that court's earlier decision in *AT&T Corp. v. City of Portland* (*Portland*)[41] on procedural grounds, without re-examining the merits of the case. In *Portland*, the court had found that franchising authorities were preempted from regulating cable

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[37] *See GTE Operating Companies Tariff No. 1*, 13 F.C.C.R. 22466, 1998 WL 758441 (1998).
[38] *PROPOSED RULES, Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 67 FR 9232-01, 2002 WL 274748 (F.R.), CC Docket No. 02-33, CC Docket No. 95-20, CC Docket No. 98-10; FCC 02-42, February 28, 2002.
[39] *Ibid.*, ¶¶ 16-17 (emphasis in original).
[40] *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120 (2003).
[41] *AT&T Corp. v. City of Portland*, 216 F.3d 871 (2000).

modem service because it was a telecommunications service under the 1996 Act.

Because the FCC's declaratory ruling classifying cable modem service as an information service was issued *after* the *Portland* decision, the court in *Brand X* found that the FCC decision violated the established law of the *Portland* ruling, and they were bound to uphold it and vacate the FCC's ruling. The FCC has sought to appeal the Ninth Circuit's *Brand X* decision, which therefore leaves this issue currently unresolved. Should the *Brand X* decision be upheld, the FCC could still prevent cable modem services from having to meet the requirements of a telecommunications service under their ability to forbear from applying relevant Title II telecommunications regulations to cable modem service. The FCC has acknowledged in its Declaratory Ruling that they would be very willing to issue such a forbearance to preclude cable modem service being regulated as a telecommunications service.

Recent Court Challenges

On February 12, 2004, the FCC ruled that Pulver.com's Free World Dialup ("FWD") service is an unregulated information service subject to the FCC's jurisdiction. Pulver.com's FWD allows users of broadband Internet access services to make VoIP or other types of peer-to-peer communications directly to other FWD members, without charge. In 2003, Pulver.com filed a petition for declaratory ruling requesting that the FCC rule FWD to be neither a "telecommunications service" nor "telecommunications," and therefore not subject to traditional telephone regulation. The FCC's recent ruling granted Pulver.com's petition, finding that because Pulver.com does not provide the transmission medium, but is merely an Internet applications that facilitates peer-to-peer voice (and other sessions), it is not "telecommunications," not a "telecommunications service," and is exempted from Title II obligations. The FCC noted that its ruling "emphasizes the FCC's long-standing policy of keeping these consumer Internet services free from burdensome economic regulation at both the federal and state levels."

Notably, at the same time, the FCC announced the release of a NPRM to examine issues related to services and applications which make use of IP-protocol, such as VoIP, which it has now deemed "IP-enabled services." Specifically, the FCC seeks comment on whether and how to apply discrete regulatory requirements to these services where necessary to fulfill important federal policy objectives. FCC Chairman Powell emphasized in his comments that "[w]hile IP-enabled services should remain free from traditional monopoly regulation, rules designed to ensure law enforcement access, universal service, disability access, and emergency 911 service can and should be preserved in the new architecture."

PART FOUR: NON-DISCRIMINATORY ACCESS

"A requirement that a cable television company shall provide its competitors non-discriminatory access to the CATV company's cable communications system"

PART FOUR: NON-DISCRIMINATORY ACCESS

There are two ways in which access to franchised cable operators' systems arises as an issue affecting the state of competition. The first concerns access for multi-channel video programming service providers, which could be characterized as non-facilities based marketers or packagers of programming, and Internet service to the cable operator's lines in competition with its own product offerings. The second involves program producers or programming channel owners' access to the franchised cable company's packages offered its customers.

Multi-channel Video Service Provider Access

A state requirement that a cable television company provide other competing multi-channel video programming providers with non-discriminatory access to the company's cable communications system presents a number of problems. As discussed elsewhere in this report, a similar question has been raised with respect to access to the system by competing Internet access providers.

The foremost consideration in any discussion of is that of federal pre-emption. Provisions in the 1984, 1992 and 1996 Acts touch upon the unique originations and evolution of cable law. Unless otherwise stated in the Act, state and local authority over cable is limited to those specific matters and actions expressly delegated in the Act.[43] The 1972 New Jersey Cable Television Act directed the Board and Office of Cable Television to cooperate and coordinate with all Federal laws, rules and regulations relating to cable television systems and companies.[44]

These antecedents are very different from those applicable to telecommunications. By the very nature of the broadcast or satellite signals retransmitted, cable television services are not readily distinguishable as intrastate or interstate, as has been the case of point to point telephone calls. The products and the business models upon which they are based are different, even though in many senses, both services now are just pumping electrons through pipes.

The origins of telecommunications regulation can be found in the common carrier concept. The regulatory framework for common carrier communications was established as a service independent of content. Cable television service, by itself, is a product marketable solely because of its entertainment content. This means mandated access presents constitutional issues not present in the common carrier mode. Federal Courts have recognized an applicability of the First Amendment to cable television operators, along with the recognition of cable operators as more akin to newspaper publishers than traditional common carriers.

These difficulties were recognized by Congress in the 1996 Act when it created OVS as a voluntary solution with incentives to encourage cable systems to open their distribution lines to other multi-channel video providers. Since the enactment of the OVS provisions, the focus of legal analysis shifted elsewhere, and there was never a final determination from the FCC on the issue.

It important to note the other legal distinctions between the non-discriminatory access provisions applicable to telecommunications companies, and those applicable to cable companies. The use of non-discriminatory access rules within the two industries, while conceptually similar,

[43] *E.g.*, 47 U.S.C.A. § 543(1).
[44] N.J.S.A. 48:5A-2(c), -10.
[46] 47 U.S.C.A. § 628

varies greatly. The telecommunications industry has extensive non-discriminatory access regulations that allow a CLEC or Internet service provider ("ISP") to "piggyback" on parts of the ILEC's network to provide customers with telephone or Internet services. No such access rights exist with respect to the cable industry absent various rules allowing certain programmers limited access to the channel capacity of cable providers. The telecommunications industry has significantly more non-discriminatory access rules than cable as a result of the longstanding and critical role the industry has played in the development of the Internet and other information networks, and because of the 1996 decision by Congress to open up the local telephone network to competition.

The most important non-discriminatory access rules in the telecommunications industry resulted from the development of the earliest precursors to the Internet. The FCC was concerned with the intersection of data and voice services provisioned over the public switched telephone network. These rules were triggered by the relatively robust competition in the data services market beginning in the early 1960s, coupled with the dependence of data service providers on the ILECs' underlying transmission facilities to provide "enhanced services." Specifically, the FCC was worried that because data services require monopoly-provided telecommunications components as inputs, ILECs that offered data services would discriminate against unaffiliated data service providers by denying them access to these telecommunications components at reasonable rates and on nondiscriminatory terms and conditions. The Commission was also concerned that ILECs would cross-subsidize their unregulated services, such as data processing, with revenue derived from highly-regulated offerings, such as local and business basic telephone service. Consequently, the Commission initiated a series of decisions (often referred to as the "Computer Inquiries"), under which ILECs are required to unbundle their underlying transmission facilities on a nondiscriminatory basis. Thus, these rules allow consumers, for example, to choose from thousands of ISPs for traditional dial-up Internet access.

The 1996 Act went far beyond the Computer Inquiries, initiating the most extensive form of nondiscriminatory access ever encountered in any network industry. The 1996 Act requires ILECs to provide UNEs at cost-based rates to any CLEC wishing to provide a "telecommunications service." The 1996 Act also allowed collocation of competitors' equipment in ILEC facilities and resale of ILEC retail services, provisions not found in the Computer Inquiries, which granted more limited unbundling of the underlying transmission element of an enhanced service at nondiscriminatory rates. Even though the 1996 Act went beyond many of the Computer Inquiries rules, those rules are still operative, for the most part to protect data service providers, which do not benefit from the 1996 Act's unbundling and resale rules.

Reinforcing these regulatory differences between the telecommunications and cable industries, the FCC in 2002 explicitly rejected imposing legacy telecommunications-specific non-discriminatory access regulations on cable companies. The FCC ruled that broadband Internet access provided by cable companies falls under the minimally-regulated information services statutory classification found in the 1996 Act. Consequently, companies wishing to provide Internet service over the cable company's wires are precluded from resorting to the non-discriminatory access provisions of the 1996 Act, which only apply to telecommunications services and not information services. The FCC also declined to apply the non-discriminatory access rules promulgated in the Computer Inquiries—which allow non-affiliated ISPs to utilize parts of the ILEC's network to provide customers with Internet access and other forms of information services—to cable broadband Internet service. Moreover, by confirming that cable broadband Internet access is "interstate," the FCC has further reinforced barriers to state and local regulation of Internet access provided by cable companies.

Programmer Access

Leased Access

Federal law already provides some access protections for would-be program providers. The longest standing one is the leased access requirement of the 1984 Cable Act, which requires channel capacity be made available to programmers to purchase time and/or channels. It includes an FCC-administered process for protecting the rights established for programmers and for insuring the programmers are charged fair rates. The dominant program content under this framework is infomercials.

Operator Affiliated Access

Another purpose of the Act is designed to keep cable operators from favoring affiliated programming services or channels.[46] In New Jersey, a recent example has centered around the issue of whether affiliated programming is being favored in the YES Network dispute. YES Network, a regional sports programmer, unaffiliated with any cable operator, has exclusive rights to cablecast New York Yankee baseball games. Cablevision owns a number of metropolitan area sports teams and cable systems in New Jersey, as well as rights to Madison Square Garden and Fox Sports programming. YES Network reached agreement for its programming to be carried with all cable operators except Cablevision. A dispute arose that ultimately has been settled through arbitration. Arguably, the dispute fueled migration of some customers to the DBS provider.

Another example involved Comcast when they were able to deny operators in New Jersey access to regional sports programming of teams they owned because the programming was distributed to the cable systems by microwave rather than satellite. Recently legislation was proposed in Congress to include all regional sports programming in access provisions.

Public Education Governmental Access Channels

While federal law specifically permits state or local franchising law to establish local access channels, New Jersey has no statewide minimum public, educational, or governmental (PEG) access channel requirements. These are determined by each municipality during the franchise process, as is the responsibility for daily administration and operation of the channels, and virtually all franchises in the state contain some kind of PEG access channel provision. The Office of Cable Television monitors for compliance with the general federal requirements that these channels be non-commercial and available on a first come, first serve basis. Complaints in New Jersey about the cable operator denying access to these channels are rare. Occasional disputes usually involve local parties and are handled by the Office of Cable Television on a case-by-case basis.

CONCLUSION

Under the mandate provided by Public Law 2003, Chapter 38, this Report is issued and filed by the New Jersey Board of Public Utilities on this Fourteenth day of April, 2004. The Board submits this Report and offers the testimony provided by the public through oral and written comments as an overview of the state of competition in the multi-channel video distribution throughout the State.

Respectfully submitted,

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APPENDIX

Testimony at February 26, 2004 Public Hearing

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Agenda Item:

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OFFICE OF CABLE TELEVISION

I/M/O STATUS OF MULTI-CHANNEL VIDEO PROGRAMMING COMPETITION IN STATE OF NJ REQUIRED BY P.L. 2003 CHAPTER 38 (668)

ORDER

DOCKET NO. CO04030141

(SERVICE LIST ATTACHED)

BY THE BOARD:

As directed by Chapter 38 of the Public Law of 2003 (P.L.2003, c.38), section 7, the New Jersey Board of Public Utilities (Board) has prepared a study that examines a number of key issues in the field of video competition in the State, and the role and impact that the Board and the Legislature can have both now and in the future.

P.L. 2003, c.38 (1) authorized municipalities to join together with other municipalities to grant "regional" consent for the provision of cable television service and to employ private aggregators to act on behalf of two or more municipalities in negotiating and granting municipal consent for the provision of cable television service; (2) provided an incentive to cable television companies to open their cable to use by video programming providers; (3) required the Board to prepare a study on various aspects of the cable television industry; and (4) established a procedure for recording and reporting consumer complaints received by cable television companies.

The requirement to prepare a study under section 7 of the Act set forth four explicit topics for review and discussion. The study required the Board to examine: (1) "the technical and regulatory issues associated with classifying every high-speed Internet service as a 'telecommunications service,' as defined in section 2 of P.L.1991, c.428 (C.48:2-21.17);" (2) the possible impact and basis for "a requirement that a cable television company shall provide its competitors non-discriminatory access to the CATV company's cable communications system;" (3) "the state of multi-channel video programming competition between different facilities-based and non-facilities-based telecommunications companies in New Jersey, such as cable television companies, digital broadcast satellite companies, local exchange telecommunications companies and interexchange telecommunications carriers and, in particular, the state of competition in New Jersey among the dominant cable television companies for the same customers;" and (4) "the technical and regulatory issues associated with promoting multi-channel video programming competition in New Jersey by local exchange telecommunications companies and interexchange telecommunications carriers." As directed, the Board studied each of those issues extensively and reached the following conclusions:

Discussion and Conclusions

- ξ wireline competition among video providers in New Jersey is sparse.

- ξ although there are no outright prohibitions or exclusions to telephone companies entering the video market, various state requirements may be viewed by some parties as impediments.

- ξ while technical barriers to providing video over telephone lines are few, the expense of upgrading the existing infrastructure significantly impedes the offering of video services by local exchange carriers.

- ξ the rate regulation of high speed Internet services has mostly been preempted by federal regulations; and the issue of non-discriminatory access arises in two contexts: (1) access for multi-channel video programming service providers, which could be characterized as non-facilities based marketers or packagers of programming, and Internet service to the cable operator's lines in competition with its own product offerings; and (2) programmer access to the service packages sold by the franchised cable operator to its customers. In either case, the examination concluded that a requirement that a cable television company shall provide its competitors non-discriminatory access to the CATV company's cable communications system would be extremely problematic under State law.

The Report provides these and other conclusions, and presents much more detail and analysis, as was required by P.L.2003, c.38. Accordingly, and in satisfaction of the requirements of the Act, the Board HEREBY ADOPTS the Report and HEREBY DIRECTS and ORDERS Board Staff to transmit the Report to the Governor, the President of the Senate, the Speaker of the General Assembly, the Minority Leader of the Senate, the Minority Leader of the General Assembly, and the members of the Senate Commerce Committee and the Assembly Telecommunications and Utilities Committee, or their respective successor committees, as provided by P.L.2003, c.38, section 7.

DATED: 4/14/04

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